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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 911

JOHN SALANTIDO, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

JOHN SALANITRO, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Tenth Circuit Court of Appeals of the United States which affirmed the judgment of the United States District Court for the District of Colorado, convicting the Petitioner of perjury in violation of 18 U.S.C. § 1621 (1964).

OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals has not been reported in the Federal Reporter. A copy of the opinion is appended to this Petition (Appendix "A").

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on September 28, 1970. (Appendix A) The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254 (1964).

The time for filing this Petition expires on October 28, 1970. This Petition for a Writ of Certiorari is filed within that time.

QUESTIONS PRESENTED

I.

In April of 1969, the Grand Jury for the District of Colorado was investigating certain transactions alleged to be in violation of 18 U.S.C. § 1952. The Petitioner duly appeared before the Grand Jury and was questioned at length. On the second day of his testimony, the following transpired:

> Q. Did you have a meeting in April of 1967 with —make that September of 1966, did you travel to Denver, Colorado, and meet one of the Smaldones and one *Poley* Villano at Stapleton Airport?
>
> A. What year was that you say?
>
> Q. '66.
>
> A. No.
>
> Q. You did not?
>
> A. No.
>
> Q. Have you ever come to Denver, Colorado, and met any of the Smaldones at Stapleton Airport?
>
> A. No.
>
> Q. Do you know *Poley* Villano?
>
> A. No.
>
> Q. He is also known as Fat *Poley*.

A few questions later, and after being asked about an alleged meeting that occurred in April of 1967 in Omaha, Nebraska, the Petitioner testified:

Q. Have you ever met Clyde Smaldone?
A. Not to my knowledge, no.
Q. He has a nickname, that is Flip-Flop.
A. Definitely not.

It is this testimony concerning the encounter at Stapleton Airport that forms the basis of the Petitioner's conviction.

The Government offered the evidence of two individuals, a police officer of the Denver Police Department and an F.B.I. agent. The police officer testified that while working at Stapleton Airport on September 4, 1966, he observed Paul Villano and Clyde Smaldone, both known to him, talking to a person unknown to him but who he later learned was the Petitioner. The conversation lasted only five to ten minutes and the Officer did not know the contents or substance of the conversation. This conversation occurred in the airport passengerway while United Air Lines Flight No. 237 for Las Vegas was stopped en route from Omaha, Nebraska. The Petitioner, in the company of his wife, was travelling to Las Vegas for the purpose of a vacation. After this brief encounter, the Petitioner and his wife boarded the airplane and left.

To satisfy the "two witness rule" the Government relied exclusively upon the testimony of the F.B.I. agent. The F.B.I. agent testified that on January 5, 1967, he engaged in a conversation with the Petitioner in Omaha, Nebraska. He testified that in this conversation he asked the Petitioner about any trips that he might have taken out of Omaha in the recent past.

The Petitioner, according to this witness, stated that he had been to Las Vegas and that while he was on this trip the agent testified that the Petitioner told him that he had seen one of the Smaldones at the airport while the plane had stopped in Denver. Nothing more was mentioned of this event. Which of the Smaldones that was seen by the Petitioner was not identified by the F.B.I. agent. The F.B.I. agent further testified that the Petitioner told him that the conversation did not in any way relate to gambling or other similar activities.

The question presented, therefore, is: Whether the evidence offered by the Government to substantiate the charges contained in the Indictment was sufficient to satisfy the "two witness rule" required to support a conviction for perjury.

II.

During the course of the Petitioner's testimony, he was questioned at great length concerning his knowledge of several individuals, both in Omaha and Colorado. The United States Attorney conducting the interrogation encountered considerable difficulty in the pronunciation of certain names and, particularly, the name Paul Villano. In addition, the questioning of the Petitioner was directed at specific meetings between the Petitioner and other persons, including Clyde Smaldone and Paul Villano. He was asked about meetings that supposedly occurred in April of 1967 and September of 1966. These meetings were supposed to have occurred both in Denver, Colorado, and in a motel in Omaha, Nebraska. The manner and format in which the questions were propounded to the Petitioner created confusion and uncertainty in the

mind of the Petitioner. The evidence, rather than establishing the existence of a true meeting between the Petitioner and other individuals, showed merely that for about five to ten minutes the Petitioner was with Paul Villano and Clyde Smaldone in an airport walkway in Denver while the Petitioner and his wife were on their way to their vacation.

The question, therefore, presented is: Was the Petitioner's testimony before the Grand Jury given with the willful intent to mislead, hamper and frustrate that body in its investigation or was it the consequence of confusion and misunderstanding resulting from the context of and the manner in which the questions were propounded?

STATEMENT OF THE CASE

In April of 1969, the Grand Jury for the District of Colorado was investigating certain activities thought to be in violation of Title 18, U.S.C. § 1952. Petitioner was subpoenaed to testify before the Grand Jury and appeared before it on April 3, 1969, and April 4, 1969.

During the course of his testimony, the following transpired:

> Q. Did you have a meeting in April of 1967 with—make that September of 1966, did you travel to Denver, Colorado, and meet one of the Smaldones and one *Poley* Villano at Stapleton Airport?
>
> A. What year was that you say?
>
> Q. '66.
>
> A. No.
>
> Q. You did not?
>
> A. No.

Q. Have you ever come to Denver, Colorado, and met any of the Smaldones at Stapleton Airport?
A. No.

Q. Do you know *Poley* Villano?
A. No.

Q. He is also known as Fat *Poley*.

A few questions later, and after being asked about an alleged meeting in April of 1967 in Omaha, Nebraska, the Petitioner testified:

Q. Have you ever met Clyde Smaldone?
A. Not to my knowledge, no.

Q. He has a nickname, that is Flip-Flop.
A. Definitely not.

Considering this testimony to be perjured, the United States Attorney directed that a transcript of the Petitioner's testimony be made and sent to the United States Attorney's office for further consideration.

Between the completion of the transcript and the return and filing of the Indictment charging the Petitioner with perjury, certain portions of the transcript of the Petitioner's testimony before the Grand Jury were changed by the United States Attorney. Specifically, the United States Attorney changed the name "Poley Villano" as it appeared in the Grand Jury transcript to "Paul Villano". The indictment upon which the Petitioner was tried and convicted contained the altered portions of the proceedings before the Grand Jury. It charged perjury as follows:

Q. Did you have a meeting in April of 1967 with—make that September of 1966, did you travel to Denver, Colorado, and meet one of the Smaldones and one Paul Villano at Stapleton Airport?
A. What year was that you say?

Q. '66.
A. No.

Q. You did not?
A. No.

Q. Have you ever come to Denver, Colorado, and met any of the Smaldones at Stapleton Airport?
A. No.

Q. Do you know Paul Villano?
A. No.

* * *

Q. Have you ever met Clyde Smaldone?
A. Not to my knowledge, no.

Q. He has a nickname, that is Flip-Flop.
A. Definitely not.

On September 30, 1969, after a trial by the Court, the Petitioner was adjudged guilty of perjury in giving the following testimony before the Grand Jury:

Question: Have you ever come to Denver Colorado, and met any of the Smaldones at Stapleton Airport?
Answer: No.

* * *

Question: Have you ever met Clyde Smaldone?
Answer: Not to my knowledge, no.
Question: He has a nickname. That is Flip-Flop.
Answer: Definitely not.

THE PROSECUTION'S EVIDENCE

During the course of the Grand Jury proceedings, the United States Attorney posed several inquiries to the Petitioner as to whether he knew several individuals. In asking these questions, the United States Attorney experienced considerable difficulty in pronouncing several names. This mispronunciation caused the Petitioner to be confused which confusion was admitted by the foreman of the Grand Jury. In

addition, the Petitioner was confused as to his understanding of the availability of the protection afforded to him by the privilege against self-incrimination.

The mispronunciation committed by the United States Attorney involved the very testimony which was challenged as perjury. The reporter transcribed the question as it sounded to him. Phonetically, the Petitioner was asked about "Poley" Villano. The Petitioner stated that he did not know that man. The Government offered no evidence to establish the fact that the Petitioner knew "Poley" Villano or Paul Villano.

The gist of the inquiry before the Grand Jury pertained to certain meetings that were supposedly being held in Denver, Colorado. The evidence offered at trial established a brief encounter at Stapleton Airport in September of 1966 between Petitioner, Clyde Smaldone and Paul Villano. The Government called Officer Hayes of the Denver Police Department as one of its two principal witnesses. He testified that while working at Stapleton Airport he observed Paul Villano and Clyde Smaldone talking to a person later identified as the Petitioner. Paul Villano and Clyde Smaldone were known to Officer Hayes but Petitioner was not. He learned the identity of the Petitioner only through later investigation of the flight manifest and other records. He further testified that the Petitioner was accompanied by a woman. This was the Petitioner's wife. The encounter between the three individuals lasted about five to ten minutes and Officer Hayes was unable to testify as to what subjects the individuals discussed. This short colloquy took place while United Air Lines Flight No. 237 for Las Vegas was temporarily stopped en route from Omaha, Nebraska. The

Petitioner and his wife were travelling to Las Vegas for the purpose of a vacation. After this brief episode, the Petitioner and his wife boarded the plane and left.

As its last witness, the Government called Don R. Anderson, an agent of the Federal Bureau of Investigation. He testified that on January 5, 1967, he engaged in a conversation with the Petitioner in Omaha, Nebraska. He testified that in this conversation he inquired of the Petitioner about any trips that he might have taken out of Omaha recently. He further testified that the Petitioner stated to him that while he was on vacation he had seen one of the Smaldones at the airport while the plane was stopped in Denver. Nothing specific about this event was mentioned and, most importantly, which of the Smaldones that was seen by the Petitioner was not identified by the witness for the Government.

At this stage of the evidence, both the Government and defense rested. A motion for acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure was denied and Petitioner was found guilty.

Petitioner timely appealed and on September 28, 1970, the judgment of the trial court was affirmed by the Tenth Circuit Court of Appeals, per curiam.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

The decision below is in conflict with *Van Lieu* v. *United States*, 321 F.2d 674 (5th Cir. 1963). There, it was unequivocally held that a charge of perjury cannot be sustained through the device of taking a statement of the accused out of its immediate context and thereby giving it a meaning wholly different from that which its context clearly shows.

The Government charged this Petitioner with having perjuriously denied that he came to Denver to have a meeting with one of the Smaldones and Paul Villano. The context of the question, "Have you ever come to Denver, Colorado, and met any of the Smaldones at Stapleton Airport?" was in reference to specific meetings having as their purpose activities which would supposedly be in violation of 18 U.S.C. § 1952. The context in which the question was propounded to the Petitioner clearly indicates that the inquiry of the United States Attorney asking the question was directed at specific meetings involving the Smaldones either in Denver, Colorado, or Omaha, Nebraska. Yet the evidence offered to prove a perjured denial of such a meeting established only a brief encounter between the Petitioner and Clyde Smaldone and Paul Villano in an airport while the Petitioner was on vacation with his wife. The evidence at trial pertaining to the questions and answers which form the basis of the Petitioner's conviction and the framework in which they were propounded before the Grand Jury discloses a complete change of context and thereby a complete change in their meaning. This cannot be done in order to substantiate a charge of perjury. In *Van Lieu* v. *United States, supra,* it was stated:

> The defendant, Gordon Van Lieu, asserts here as he asserted in his motion for judgment of acquittal below, that the allegedly perjured statements set out in Count IV . . . were lifted out of the context in which they were spoken at the injunction hearing. Consequently, there was a failure to prove either falsity or intentional falsification. We agree. It is vital, of course, that the stream of justice not be contaminated by untruths, *Adams* v. *United States,* 5 Cir., 1962, 302 F.2d 307, 310 (dissenting). But the seriousness of the crime of perjury and the fact that it turns finally on the sub-

jective knowledge and purpose of the swearer require that the Government not be allowed to predicate its case upon the answer to a single question which in and of itself may be false, but which is not shown to be false when read in conjunction with testimony immediately preceding and following the alleged perjured statement. The oft-quoted rule is applicable here. "A charge of perjury may not be sustained by the device of lifting a statement of the accused out of its immediate context and thus giving it a meaning wholly different than that which its context clearly shows." *Fortie* v. *United States*, 8 Cir., 1943, 137 F.2d 831, 842; *Brown* v. *United States*, 8th Cir., 1957, 245 F.2d 549, 546; *United States* v. *Geller*, S.D.N.Y., 1957, 154 F. Supp. 727, 723, N. 3; Cf. *Meyers* v. *United States*, 148, 84 U.S. App. D.C. 101, 171 F.2d 800, 806, 11 A.L.R. 2d 1. *Id.* at 677-78.

It is respectfully submitted that the entire context in which the Petitioner was questioned before the Grand Jury dealt with specific meetings involving specified individuals for the purpose of engaging in activities prohibited by 18 U.S.C. § 1952. It was upon this activity that the United States Attorney and the Grand Jury focused their interest. It was in this light and in this vein that the Petitioner testified as he did. However, the perjury of which the Petitioner stands convicted is based upon a momentary encounter between certain individuals in an airport. The context of the testimony was changed from that which existed before the Grand Jury. *Van Lieu* v. *United States*, *supra*, prohibits such a device and declares that a perjury conviction cannot stand under such circumstances.

II.

The decision of the Tenth Circuit Court of Appeals is in clear conflict with *United States* v. *Wall*, 371 F.2d

398 (6th Cir. 1967). The court below did not consider its application. In *Wall*, the Sixth Circuit declared that a perjury conviction could not be based upon answers to questions which were inarticulately phrased and susceptible of different interpretations.

Loretta Wall was convicted of perjury after a trial to the court. The indictment arose out of her testimony given before a Grand Jury which was investigating income tax evasion charges against another individual. The indictment charged that the defendant testified falsely before the Grand Jury as follows:

> Q. Have you ever been on trips with Mr. X?
> A. I have not.

The Government admitted that the words, "been on trips" were susceptible of two different meanings—either that a person accompanied somebody else while travelling or that a person was at a particular place with another person.

The prosecution's evidence, in *Wall, supra,* is remarkably similar to the evidence that the Government offered against the Petitioner here. The evidence showed that Mrs. Wall and the individual under investigation were seen together leaving a room in a motel in Miami Beach. The Sixth Circuit Court of Appeals found no difficulty in holding that, *as a matter of law,* the evidence was insufficient to support the conviction and that the questions were so defective that the answers to them could not be the basis of a charge of perjury. The Court stated as follows:

> The trouble with this case is that the question upon which the perjury charge is based, was inarticulately phrased, and, . . . was susceptible of two different interpretations. In our opinion, no charge

of perjury can be based upon an answer to such a question. If Mrs. Wall had understood the question to mean whether she had accompanied Swarthout on any trips, then so far as the record is concerned, her answer was correct and truthful. If the Government desired to elicit proof as to whether Swarthout and she ever stayed together in a motel room in Miami Beach, or elsewhere, it could easily have phrased a proper question designed to obtain such information.

Where the defendant is under oath and in response to a question asked of him gives an answer which is "literally accurate, technically responsive or legally truthful," he cannot be convicted lawfully of perjury. *Smith* v. *United States*, 169 F.2d 118 (6th Cir. 1948); *Galanos* v. *United States*, 49 F.2d 898 (6th Cir. 1931).

This must be so because the essence of the crime of perjury as defined in the statute is the belief of the witness concerning the veracity of his testimony. *United States* v. *Winter*, 348 F.2d 204, (2nd Cir. 1965), cert. denied 382 U.S. 955, 86 Sup. Ct. 429, 15 L.Ed.2d 360. In a case where the question propounded admits of several plausible meanings, the defendant's belief cannot be adequately tested and it is necessary to determine what the question meant to him when he gave the disputed answer. *United States* v. *Lattimore*, 127 F.Supp. 405 (D. D.C. 1955) aff'd. 98 U.S. App. D.C. 77, 232 F.2d 334 (1955). *Id.* at 399-400.

Examination of the transcript of the questioning of the Petitioner before the Grand Jury renders it beyond the realm of argument that the question propounded to the Petitioner was most inarticulately phrased. He was first asked about a meeting in April of 1967 with Mr. Smaldone and Paul Villano. The interrogator then immediately changed that question to refer to

September of 1966 and contemporaneously broadened it to one of whether he had travelled to Denver, Colorado, for this purpose. Not only was the question confusing as to the element of what time that this alleged event occurred, it was most confusing in that it refers not only to a meeting but mere travels that might have possibly been made by the Petitioner. Moreover, the United States Attorney had ample opportunity to clarify, pinpoint and sharpen his question but did not avail himself of it. Rather, he compounded the confusion that already existed by referring back to the inquiry concerning a meeting. When the series of questions relating to the claimed perjury is examined as they unfolded before the Petitioner, he was asked whether he had a meeting in April of 1967; whether he had a meeting in 1966; whether he travelled to Denver, Colorado, for the purpose of meeting; and whether he had ever met Mr. Smaldone at Stapleton Airport.

In addition to the confusion that resulted from the manner in which the Petitioner was questioned, it is equally clear that the questions that were propounded to him were susceptible of different meanings. A meeting, in the Petitioner's mind, could well mean a purposeful confrontation with other individuals to discuss one or more specified matters. On the other hand, to merely have seen some individuals at an airport could be considered by the Petitioner not to have been within the contemplation of the question. The evidence does indicate that the Petitioner did have the occasion to encounter Mr. Smaldone and Mr. Villano at Stapleton Airport. The evidence is beyond dispute that this encounter lasted only a few minutes while his plane was temporarily stopped in Denver, Colorado. Moreover, the Petitioner was on vacation with his wife.

The prosecution made no attempt to submit evidence or in any way shed light on the issue of what the question meant to the Petitioner when he gave the answers as he did. It is submitted that it was quite reasonable for the Petitioner to interpret the United States Attorney's question as one asking about a true meeting between himself and other individuals. It was equally reasonable for the Petitioner to consider the United States Attorney's question as one not directed to the short encounter that the evidence established. *United States* v. *Wall, supra,* is clearly dispositive and the decision reached by the Tenth Circuit Court of Appeals rejecting its rule without discussion of it is in direct conflict.

III.

The evidence offered by the prosecution to substantiate the charge of perjury fails to satisfy the "two witness rule" that is both peculiar and essential to a perjury conviction.

The "two witness rule" requires that the falsity of the statement alleged to have been made by the Petitioner must be established either by the testimony of two independent witnesses, or by one witness and independent corroborating evidence which is inconsistent with every reasonable hypothesis of the innocence of the accused. *U. S.* v. *Wood,* 39 U.S. 430 (1840); *Hammer* v. *United States,* 271 U.S. 620 (1926); *Weiler* v. *United States,* 323 U.S. 606 (1945). If the Government intends to rely on the direct testimony of one witness and corroborating evidence to satisfy the "two witness rule", the evidence offered as corroboration must be independent of the direct testimony and com-

pletely inconsistent with the innocence of the defendant. *United States* v. *Neff*, 212 F.2d 297 (3rd Cir. 1954).

The statement attributed to the Petitioner, namely, that while in Denver he met "one of the Smaldones," does not, it is respectfully submitted, corroborate the testimony of the witness to the encounter in the airport between Clyde Smaldone and the Petitioner. Mr. Smaldone was with Mr. Villano. It was admitted by the Government at the close of its case that there was no evidence to support any finding that the Petitioner knew or had ever met Mr. Villano. The Petitioner's statement corroborates only the fact that he encountered someone by the name of Smaldone. The Petitioner was charged with perjuriously denying that he had met *Clyde* Smaldone. The statement attributed to him by the F.B.I. agent does not constitute evidence that he, in fact, met Clyde Smaldone. Hence, the evidence offered to corroborate the direct testimony of the encounter between the Petitioner and Clyde Smaldone falls short of requirement of the "two witness rule". The corroborating evidence must stand alone and have the same force and effect as the direct testimony. This corroborating evidence merely refers to the Smaldones; it does not establish and could not be the basis of a finding that the Petitioner did, in fact, meet Clyde Smaldone.

Weiler v. *United States, supra,* spells out the test that corroborating evidence must meet in order to achieve compliance with the "two witness rule".

> Two elements must enter into a determination that corroborative evidence is sufficient, (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the

> alleged perjurous statements; and (2) that the corroborative evidence is trustworthy. *Id.* at 610.

The statement of the Petitioner as recounted by Agent Anderson fails to satisfy the *Weiler* test. The Petitioner only stated that he had seen one of the Smaldones. This evidence was offered to corroborate the perjury that was alleged to have been committed by the Petitioner; namely, that he denied that he had ever met an individual by the name of Clyde Smaldone. Merely stating that one has met one of the Smaldones does not as a matter of law corroborate the allegation that one has met Clyde Smaldone. The evidence offered to corroborate the testimony of Officer Hayes falls directly within the interdiction of *United States* v. *Neff*, 212 F.2d 297 (3rd Cir. 1954):

> Evidence tending to establish the probability of conduct is not enough; more than that is required; the path from the corroborating evidence must lead directly to the inevitable—not merely probable—conclusion of falsity. The corroborative evidence must directly substantiate the testimony of a single witness who has sworn to the falsity of the alleged perjurous statement and must be equally strong and convincing as the direct testimony which would be regarded as sufficient proof. *Id.* at 308.

In summary, the Petitioner's statement that he met one of the Smaldones does not lead to the inevitable conclusion that one of the Smaldones to which he was referring was Clyde Smaldone. It is this direct link that the Government must establish by evidence beyond a reasonable doubt before a perjury conviction can be established. The evidence fails to meet this requirement and the Petitioner's conviction, therefore, cannot be sustained.

CONCLUSION

For the above and foregoing reasons, the decision of the Tenth Circuit Court of Appeals sustaining the judgment of the trial court is erroneous and, therefore, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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October, 1970

APPENDIX "A"

[Opinion of the Lower Court and Judgment]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

September Term, 1970

No. 721-69

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOHN SALANITRO, *Defendant-Appellant.*

Filed Sep. 28, 1970 Howard K. Phillips, Clerk

Appeal from the United States District Court
for the District of Colorado

(D.C. No. 69-CR-190)

James J. Morrato (of Eriskson and Littell, 440 Capitol Life Center, Denver, Colorado, 80203, on the brief), for Appellant.

Marvin R. Loewy (James L. Treece, United States Attorney, District of Colorado, and Thomas M. Vockrodt, Special Attorney, Department of Justice, Washington, D. C., on the brief), for Appellee.

Before JONES,* BREITENSTEIN, and HOLLOWAY, Circuit Judges.

PER CURIAM:

John Salanitro, the appellant, was called before a Grand Jury of the United States District Court for the District of Colorado. After being sworn and his identity established, questions were asked and answers were given as follows:

> Q. Did you have a meeting in April of 1967 with—make that September of 1966, did you travel to Denver,

* Of the Fifth Circuit, sitting by designation.

Colorado, and meet one of the Smaldones and one Paul Villano at Stapleton Airport?

A. What year was that you say?

Q. '66.

A. No.

Q. You did not.

A. No.

Q. Have you ever come to Denver, Colorado, and met any of the Smaldones at Stapleton Airport?

A. No.

Q. Do you know Paul Villano?

A. No.

Q. Have you ever met Clyde Smaldone?

A. Not to my knowledge, no.

Q. He has a nickname, that is Flip-Flop.

A. Definitely not.

He was thereafter charged in a one-count indictment with perjury in that the answers given to the questions asked were false. 18 U.S.C.A. 1621.

At his trial Don R. Anderson, an F.B.I. Agent, testified that the appellant had told him that the appellant and his wife stopped in Denver enroute to Las Vegas and while in Denver he, the appellant, had a conversation with "one of the Smaldones" at the airport in Denver. William S. Hayes, a detective with the Denver Police Department, testified that he had seen Clyde Smaldone, known as "Flip-Flop", in the Denver airport in conversation with a person whom he did not then recognize. He identified the person with whom Smaldone had talked from his photograph and subsequently from a view of the appellant in the courtroom.

At the trial the appellant was tried before the court without a jury. The appellant urged, as he urges before this Court, that the falsity of his statement had not been established by two witnesses or by one witness and corroborating evidence. The district court concluded that the re-

quirements of the two witness rule had been met and adjudged the appellant guilty.

The rule upon which the appellant relies has been thus stated by Professor Wright:

> "In a perjury prosecution the falsity of the statement must be established by the testimony of two independent witnesses or of one witness and corroborating circumstances." 2 Wright, Fed. Practice and Procedure 74, § 404.

The principle has been stated by the Supreme Court in Weiler v. United States, 323 U.S. 606, 89 L.Ed. 495, 65 S.Ct. 548, 156 A.L.R. 496, and by this Court in Cargill v. United States, 10th Cir. 1967, 381 F.2d 849, cert. denied 389 U.S. 1041, 19 L.Ed. 2d 831, 88 S.Ct. 781, and Doty v. United States, 10th Cir. 1958, 261 F.2d 10. See 3 Wharton, Criminal Evidence, 12th Ed., p. 397, § 956.

The conclusion is here reached, as in the district court, that the requirements of the rule were fully met.

The appellant also contended that it had not been shown that his testimony before the Grand Jury was given with an intent to mislead, hamper or frustrate it in its investigation, and that the Government had not shown the materiality of the questions asked in the presence of the Grand Jury. There is no merit in these contentions. The judgment and sentence of the district court is AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 911

JOHN SALANITRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Jury trial having been waived, petitioner was convicted by the court in the United States District Court for the District of Colorado on a one count indictment charging that he perjured himself in testimony before a grand jury, in violation of 18 U.S.C. 1621. He was sentenced to imprisonment for a year and a day and the court of appeals affirmed *per curiam* (Pet. App. A).

The grand jury was investigating possible violations of 18 U.S.C. 1952 and 1953—specifically the

transportation between Nebraska and Colorado of wagering paraphernalia and information in aid of racketeering, as to which it had received evidence before petitioner's appearance (R. 7-9). The indictment alleged that petitioner gave the following false testimony on April 4, 1969.

Q. Did you have a meeting in April of 1967 with —make that September of 1966, did you travel to Denver, Colorado, and meet one of the Smaldones and one Paul Villano at Stapleton Airport?
A. What year was that you say?
Q. '66.
A. No.
Q. You did not.
A. No.
Q. Have you ever come to Denver, Colorado, and met any of the Smaldones at Stapleton Airport?
A. No.
Q. Do you know Paul Villano?
A. No.

* * * *

Q. Have you ever met Clyde Smaldone?
A. Not to my knowledge, no.
Q. He has a nickname, that is Flip-Flop.
A. Definitely not.[1]

A detective of the Denver Police Department testified that on September 4, 1966, he observed petitioner

[1] Petitioner had appeared before the grand jury the day before and had been questioned about his relationship with the Smaldones. He either claimed his privilege or answered the questions negatively. He was then excused to consult with his counsel and requested to return on April 4.

talking with Clyde Smaldone and Paul Villano for a period of five to ten minutes, after which petitioner and his wife boarded a flight to Las Vegas (R. 28-29). An FBI agent testified that on January 5, 1967, petitioner told him that he had recently taken a vacation with his wife in Las Vegas and that on the way he met one of the Smaldones in Denver. The agent further testified that petitioner told him that he had done quite a bit of gambling with the Smaldones five years previously (R. 34-38). In finding petitioner guilty, the trial court determined (R. 93):

> [t]hat the defendant had met Clyde Smaldone in Denver at Stapleton Airport on or about the 4th of September, 1966; that the defendant talked with Clyde Smaldone at that time and place; and that one Paul Villano was with Clyde Smaldone at that time and place.

1. Petitioner contends that he was confused by the questioning (Pet. 9-15) and accordingly that the evidence failed to show an intent by him to impede the investigation of the grand jury. This contention does not withstand scrutiny.

The questions upon which the perjury prosecution was based were preceded by a particularized inquiry into petitioner's dealings and meetings with various members of the Smaldone family to which petitioner either answered negatively or asserted his privilege against self-incrimination (see, *e.g.*, R. 109-113). The background was thus entirely different from the situation in *Van Liew* v. *United States*, 321 F. 2d 674 (C.A. 5) upon which petitioner so heavily relies (Pet. 9-11), which dealt with matters of expertise

where no account was taken of other questioning which could have led the witness to misinterpret the questions to which he allegedly made perjurious responses.[3] Here, the United States Attorney corrected his inquiry as to the date of the meeting in question; indeed, at petitioner's request this date was repeated, following which petitioner twice denied the meeting (see *supra*, p. 2). Petitioner's strained effort to establish that confusion resulted because he did not understand the term "meeting" to encompass the airport encounter or because the United States Attorney may have mispronounced Villano's first name were matters as to which petitioner did not seek clarification at the time; in any event, they hardly support the claim of confusion when viewed in the total context. See *Vitello* v. *United States*, 425 F. 2d 416, 424 (C.A. 9), certiorari denied, October 12, 1970 (No. 230, this Term); *United States* v. *Stone*, 429 F. 2d 138, 140 (C.A. 2).

Petitioner's claim of lack of sufficient criminal intent is similarly without merit. The only intent necessary for conviction under 18 U.S.C. 1621 is an intent to give false testimony under oath, with the further requisite that the testimony relate in fact to a material matter. *United States* v. *Stone*, *supra*. The test of materiality—which was fully satisfied here—is whether the testimony had the tendency to impede or frustrate the grand jury's investigation. See

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[3] *United States* v. *Wall*, 371 F. 2d 398 (C.A. 6) is likewise inapposite; that case involved vague questioning which could well have been misunderstood by the witness.

United States v. *Stone*, *supra*, 429 F.2d at 140, and cases there collected.

2. Petitioner also urges that the evidence did not satisfy the "two witness" rule applicable to perjury prosecutions. The testimony of petitioner was that he did not meet Clyde Smaldone at the Stapleton Airport in Denver in September 1966, which he amplified by answering that, to his knowledge, he had never met Clyde Smaldone (*supra*, p. 2). This was directly contradicted by the testimony of the Denver detective who saw the meeting; his testimony was corroborated by the testimony of the FBI agent that petitioner himself told him that he had recently taken a vacation in Las Vegas with his wife and had met one of the Smaldones at the airport in Denver. As the court below held (Pet. 2a-3a), this latter testimony was sufficient to meet the requirement of the rule that direct evidence of the falsity of defendant's testimony be corroborated. *Weiler* v. *United States*, 323 U.S. 606, 608-611; *United States v. Hagarty*, 388 F. 2d 713, 716 (C.A. 7); *Vuckson* v. *United States*, 354 F. 2d 918, 920 (C.A. 9), certiorari denied, 384 U.S. 991.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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